

EVIDENCE — DISCOVERY — State's duties
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"The prosecutor has the duty to see that the information he has available and expects to use is marshaled and made available when required by the rules." *State v. Castaneda*, 111 Ariz. 264, 264, 528 P.2d 608, 610 (1974). In *Castaneda* the prosecutor failed to produce all of the police reports within ten days after arraignment, apparently because of an error by a file clerk. The Court recognized that the prosecutor did not act in bad faith and provided the information to the defense as soon as the prosecutor became aware of it. The Court nonetheless stated that the prosecutor "could have made a greater effort in familiarizing himself with the facts of the case he was to try," and cautioned that the prosecutor's failure to do so could be grounds for sanctions under Rule 15.7. *Id.* Yet there are limits on what the State is required to do to provide discovery for the defendant. "The criminal discovery rules do not require the state to provide a word-by-word preview to defense counsel of the testimony of the state's witnesses." *State v. Wallen*, 114 Ariz. 355, 361, 560 P.2d 1262, 1268 (App. 1977). Generally, the State must disclose the names and addresses of all of the State's witnesses along with their written or recorded statements. Rule 15.1(b)(1), Ariz. R. Crim. P. However, the State is not required to explain how it intends to use each witness. *State v. Williams*, 183 Ariz. 368, 379, 904 P.2d 437, 448 (1995) (citing *State v. Wallen*, 114 Ariz. at 361, 560 P.2d at 1268). Disclosure of the witnesses for the prosecution's case-in-chief is sufficient notice to the defendant that a witness may be called to testify at any time during the trial, including rebuttal. *State v. Hatton*, 116 Ariz. 142, 150, 568 P.2d 1040, 1048 (1977) (citing *State v. Dillon*, 26 Ariz. App. 220, 547 P.2d 491 (App. 1976)).

While the State must disclose all written or recorded statements of a witness, the court may not require the State to create or produce evidence which it must then disclose. *State v. O'Neil*, 172 Ariz. 180, 181-82, 836 P.2d 393, 394-95 (App. 1991). In *O'Neil*, decided soon after the implementation of the Victims' Bill of Rights, the victims exercised their right to refuse defense interviews. Defendant then moved to require the State to record and transcribe all victim interviews and provide the defense with copies of the transcripts. The Court of Appeals disagreed, holding that the prosecutor is not required to record all victims' statements because such a requirement would infringe upon the victim's right to refuse a defense interview and the victim's right to confer with the prosecutor. However, to the extent that communications with the victim are recorded, or otherwise reveal discoverable information, the state must disclose them. *Id.*

Further, Rule 15.1(f) states that the prosecutor's duties of disclosure under Rule 15 extend to materials and information in the possession or control of "(1) The prosecutor, or members of the prosecutor's staff, or, (2) Any law enforcement agency which has participated in the investigation of the case and that is under the prosecutor's direction or control, or, (3) Any other person who has participated in the investigation or evaluation of the case and who is under the prosecutor's direction or control."

The prosecutor is deemed responsible for obtaining and disclosing material and information held by state, county, and municipal law enforcement agencies that have participated in the investigation of the case. See *Carpenter v. Superior Court in and for County of Maricopa*, 176 Ariz. 486, 489-490, 862 P.2d 246, 249-250 (App. 1993). The prosecutor is not generally deemed responsible for disclosure of information and material held by federal law enforcement agencies, see *State v. Briggs*, 112 Ariz. 379,

383, 542 P.2d 804, 808 (1975), nor crime victims, see *State v. Piper*, 113 Ariz. 390, 392, 555 P.2d 636, 638 (1976), nor other lay witnesses, see *State v. Rienhardt*, 190 Ariz. 579, 951 P.2d 454 (1997) (citing *State v. Kevil*, 111 Ariz. 240, 243, 527 P.2d 285, 288 (1974)). Consistent with due process, when defendant demonstrates a sufficient potential need for additional information not in the possession of the prosecutor, the trial court may order third parties to produce it so long as, in the exercise of the court's discretion, defendant (1) has substantial need in the preparation of defendant's case for material or information, and, (2) defendant is unable without undue hardship to obtain the substantial equivalent by other means. *State v. Connor*, 215 Ariz. 553, 561, 161 P.3d 596, 604 (App. 2007); Rule 15.1(f). Generally, the state has an obligation to disclose material information not in its possession or under its control only if (1) the state has better access to the information; (2) the defense shows that it has made a good faith effort to obtain the information without success; and (3) the information has been specifically requested by the defendant. *State v. Armstrong*, 208 Ariz. 345, 356-357, 93 P.3d 1061, 1072-1073 (2004) (citing *State v. Rienhardt*, 190 Ariz. 579, 585-86, 951 P.2d 454, 460-61 (1997)).

A witness's cooperation with the State does not make the witness an "agent" of the prosecution for purposes of discovery. *State v. Rienhardt*, 190 Ariz. 579, 951 P.2d 454 (1997) (citing *State v. Kevil*, 111 Ariz. 240, 243, 527 P.2d 285, 288 (1974)). In *Rienhardt* the defendant and his girlfriend exchanged letters from jail; in one of those letters, Rienhardt urged his girlfriend to change her story for him. The girlfriend gave this letter to her own attorney and did not give it to the prosecutor. During questioning at

trial, the girlfriend told the prosecutor about the letter. The court told the prosecutor to get the letter from the girlfriend's attorney and the prosecutor did so.

Rienhardt's counsel moved to exclude the letter, and the court precluded the State from using the letter in its case in chief. On appeal, Rienhardt argued that the State had violated Rule 15.1, Ariz. R. Crim. P., "by failing to exercise 'due diligence' to obtain copies of all relevant letters and disclose them to the defense." *Id.* at 586, 951 P.2d at 460. The mere fact that the prosecution is in a better position to obtain the cooperation of the witness does not mean that the witness is under the prosecutor's "control." *Id.* at 587-88, 951 P.2d at 460-61 (citing *State v. Briggs*, 112 Ariz. 379, 383, 542 P.2d 802, 808 (1975)). The Court held that the State must only disclose information outside the State's possession or control if: 1) the State has better access to the information; 2) the defendant shows he has made a good faith, but unsuccessful, effort to obtain the information; and 3) the defendant specifically requests the information. *State v. Rienhardt*, 190 Ariz. 579, 585-86, 951 P.2d 454, 460-61 (1997) (citing *State v. Smith*, 123 Ariz. 231, 239, 599 P.2d 187, 195 (1979)).